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In The

Supreme Court of the United States

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

REPLY BRIEF TO AMICUS CURIAE PROFESSOR CHARLES FRIED

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ARGUMENT

The State of Alabama respectfully submits this Brief in response to the brief filed by Professor Charles Fried, as *amicus curiae*. In compliance with the directive of the Court, Professor Fried advocates the following position: "where counsel is not afforded to an indigent defendant, the Constitution of the United States does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked." Consistent with Professor Fried's position, Alabama has argued in its opening and reply briefs that the imposition of a suspended or probationary sentence, following an uncounseled misdemeanor conviction, does not violate the text of the Sixth Amendment, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), or *Scott v. Illinois*, 440 U.S. 367 (1979). Unlike Alabama in its initial reply brief, however, Professor Fried argues an expansive reading of *Argersinger* and *Scott*, which would permit activation of an uncounseled misdemeanant's suspended sentence, because imprisonment does not immediately occur on imposition of the sentence. Professor Fried's reading of *Argersinger* and *Scott* is plausible, fully consistent with the text of the Sixth Amendment, and one that Alabama would welcome. In the light of the language and reasoning contained in *Argersinger* and *Scott*, however, Alabama maintains that activation of a probated sentence for an uncounseled misdemeanant is precluded. Alabama also maintains that contempt is an effective and logical tool for the enforcement of probation orders.

I. FRIED'S INTERPRETATION OF *ARGERSINGER* AND *SCOTT* IS PLAUSIBLE AND CONSISTENT WITH THE TEXT OF THE SIXTH AMENDMENT.

In his brief, Professor Fried focuses primarily on the question whether the revocation of Shelton's probation and later imprisonment would violate the Sixth Amendment. This question is, however, speculative based on the procedural posture of this case. As explained in Alabama's initial reply brief, no effort has been made at any time to revoke Shelton's probation and incarcerate him. (Alabama Reply Brief at 9) Any evaluation regarding the constitutionality of such an action is, therefore, premature. Should this Court choose to address the issue, however, Professor Fried's proposed reading of *Argersinger* and *Scott* is plausible and, Alabama admits, more consistent with the text and original meaning of the Sixth Amendment than the position espoused in Alabama's initial reply brief. (*See* Alabama Reply Brief at 9.)

A. Professor Fried's Reading Of *Argersinger* and *Scott* Is Closer to the Original Meaning of the Sixth Amendment.

Despite expansive judicial interpretations of the right to counsel, "[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott v. Illinois*, 440 U.S. at 370, *citing* W. Beaney, *The Right to Counsel in American Courts* 27-30 (1955). The Sixth Amendment did not require appointed counsel in any

misdemeanor proceeding, including those resulting in imprisonment. Indeed, *Amici* Texas, *et al.*, have provided an extensive explanation of the history of the provision, conclusively demonstrating that, "as enacted, [it] provided nothing more than a right of an accused to the assistance of his or her own, personally funded counsel." (Texas, *et al.* Brief at 14-21) This Court recognized as much in its first opinion addressing the scope of the Sixth Amendment right to counsel. *See United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (holding that "[t]here is . . . no general obligation on the part of the government . . . to . . . retain counsel for defendants"). Professor Fried's contention that a suspended sentence, imposed following an uncounseled misdemeanor conviction, may be constitutionally activated is, therefore, entirely consistent with the text of the Sixth Amendment.

Moreover, Professor Fried presents a plausible reading of *Argersinger* and *Scott*. In *Argersinger*, this Court held that an indigent defendant, in a misdemeanor case, is entitled to appointed counsel "where imprisonment actually occurs." *Argersinger*, 407 U.S. at 38. *Scott* reaffirmed "the central premise of *Argersinger*[,]" holding that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. Professor Fried contends that imprisonment following activation of a suspended sentence does not violate *Argersinger* and *Scott* because the imprisonment does not occur immediately on imposition of the sentence. Furthermore, if imprisonment does result, it results, not from the underlying misdemeanor conviction, but from a subsequent probationary violation. Therefore, because actual imprisonment does not occur as a result of the conviction,

but instead as a result of a defendant's own actions resulting in a revocation of probation, the right to counsel is not implicated. This reading of *Argersinger* and *Scott* is consistent with the text of the Sixth Amendment and is one to which Alabama would not object. As is discussed in part II of this reply brief, however, it is not the most plausible reading of those decisions.

B. Professor Fried's Reading of *Argersinger* and *Scott* Would Give the States Greater Flexibility in Dealing with Misdemeanor Defendants Who Violate the Terms of Their Probation.

Reading *Argersinger* and *Scott* to preclude the activation of a suspended sentence obviously restricts the manner in which a sentencing authority can punish a defendant who violates the terms of his probation. Absent the option of activating a suspended sentence, a trial court must search for other remedies to enforce the terms of probation, such as the imposition of supervised probation, requiring regular meetings with a probation officer, prohibiting contact with the victim, ordering the payment of additional fines, and the utilization of its contempt powers. All of these methods of ensuring compliance with the terms of probation require the expenditure of additional time and resources. A broader reading of *Argersinger* and *Scott* to allow activation of the suspended sentence, even where counsel is not provided at trial, would provide greater flexibility in dealing with the misdemeanor defendant who violates the terms of his or her probation. It would also plainly provide a defendant with significant motivation to comply with the probation orders of the court.

II. DESPITE THE PLAUSIBILITY OF PROFESSOR FRIED'S INTERPRETATION, ALABAMA'S READING OF *ARGERSINGER* AND *SCOTT* IS THAT ACTIVATION OF A SUSPENDED SENTENCE IN A MISDEMEANOR CASE IS PRECLUDED WHEN THE DEFENDANT WAS UNCOUNSELED AT TRIAL.

As reflected in its initial reply brief, the State of Alabama has read *Argersinger* and *Scott* to preclude the activation of a suspended sentence imposed following an uncounseled misdemeanor conviction. (*See* Alabama Reply Brief at 9) (stating that "there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation"). Plainly, such an action would not violate the Sixth Amendment right to counsel as originally adopted. By its own admission, however, this Court has "departed from the literal meaning of the Sixth Amendment," *Scott*, 440 U.S. at 372, "expanded the language . . . well beyond its obvious meaning," *Nichols v. United States*, 511 U.S. 738, 746 (1994), and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373. The line has, therefore, been "drawn between criminal proceedings that result[ ] in imprisonment, and those that [do] not." *Nichols*, 511 U.S. at 746, *citing Scott*, 440 U.S. at 372. Therefore, the question presented is whether imprisonment following the revocation of probation, as opposed to imprisonment immediately following an uncounseled misdemeanor conviction, constitutes "actual imprisonment" within the meaning of *Argersinger* and *Scott*. The most plausible reading of

Argersinger and *Scott* precludes either form of imprisonment. A trial court may still, however, enforce its probation orders in a variety of ways, including its inherent powers of contempt.

A. Professor Fried's Position, While Plausible, Is at Odds With Some of the Language and Reasoning of *Argersinger* and *Scott*.

Professor Fried reads the rule of "actual imprisonment" to apply only to "those misdemeanor defendants whose cases result in *immediate* actual imprisonment." (Fried Brief at 13) (emphasis added). In adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel," however, this Court did not state, that, to fall under the ruling, the incarceration must be immediate. *Scott*, 440 U.S. at 373. Moreover, *Argersinger* and *Scott* address the *final* disposition of misdemeanor proceedings, not merely the immediate consequence of a trial. *See Argersinger*, 407 U.S. at 40 (extending the right to appointed counsel to those misdemeanors "that *end up* in the actual deprivation of a person's liberty") (emphasis added); *Scott*, 440 U.S. at 373 (relying on the references in *Argersinger* "to trials 'where an accused is deprived of his liberty' " and "to 'a case that actually *leads to* imprisonment even for a brief period' ") (emphasis added). Indeed, the rule announced in *Argersinger* requires a trial judge to consider the final disposition of the proceedings even before their commencement. *See Argersinger*, 407 U.S. at 40 ("Under the rule we announce today, every judge . . . will have a measure of the seriousness and gravity of the offense and

therefore know when to name a lawyer to represent the accused before the trial starts.").

Professor Fried relies on *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), to support his reading of *Argersinger* and *Scott*. (Fried Brief at 11) *Nichols* and *Gagnon* are, however, distinguishable. In both *Nichols* and *Gagnon*, unlike here, the defendant was imprisoned following a felony trial in which the defendant had a right to counsel, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Professor Fried's position is additionally based upon a contention that, "[b]ecause Shelton's sentence was valid at the time it was imposed, Alabama may revoke the conditional sentence without violating Shelton's constitutional rights." (Fried Brief at 14) It is difficult, however, to reconcile this contention — that a constitutionally valid sentence remains so even after the very basis of its validity is removed — with simple logic. Under *Argersinger* and *Scott*, Shelton's sentence of imprisonment was constitutionally valid when entered *only* because it was, in fact, *not imposed*; it was suspended. A suspended sentence of imprisonment does not violate the holdings of *Argersinger* and *Scott* precisely because it does not result in "actual imprisonment."

Professor Fried asserts that the revocation of probation and accompanying activation of a suspended sentence is a proceeding apart from that resulting in the conviction. (Fried Brief at 12-13) Again, relying on *Nichols* and *Gagnon*, he contends that "the extent of the right to appointed counsel must be determined separately for

each proceeding." (Fried Brief at 12) Following a misdemeanor conviction, however, a suspended sentence is set based on the underlying wrongdoing — the conduct warranting the conviction. The suspended sentence does not bear any relation to the unforeseeable post-conviction conduct. The activation of the sentence, through the revocation of probation, results in the person being imprisoned for a term that relates to the original offense and, therefore, crosses the line of "actual imprisonment." *See Scott*, 440 U.S. at 373 ("[A]ctual imprisonment [is] the line defining the constitutional right to appointment of counsel."); *see also Argersinger*, 407 U.S. at 37 (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial" (footnote omitted)).

Reading *Argersinger* and *Scott* to preclude the activation of a suspended sentence is also consistent with the majority of appellate courts that have considered the issue. *See, e.g., United States v. Foster*, 904 F.2d 20, 21 (9th Cir. 1990) (holding that "[s]ince imprisonment could not have been imposed on Foster at the conclusion of his trial . . . , imprisonment could not be imposed on Foster following revocation of his probation"); *Ramirez v. State*, 486 S.W.2d 373, 374 (Tex. Crim. App. 1972) (reversing order revoking probation on basis "that at the trial for the misdemeanor offense the appellant was not advised of his right to counsel and thus cannot be held to have waived his known right unless the State can show[ ] otherwise"); *Neilson v. Superior Court, Cochise County*, 767 P.2d 1185, 1186 (Ariz. Ct. App. 1988) (right to counsel violated where petitioner incarcerated on revocation of

probation when deprived of right to counsel at trial); *State v. DeRosa*, 633 A.2d 277, 279-80 (Va. 1993) (where indigent defendant is denied trial counsel, imprisonment cannot be imposed by revocation of probation); *Parks v. McClung*, 524 S.E.2d 718, 720 (Ga. 1999) ("[A] revoked probated sentence is nothing less than actual imprisonment."), *cert. denied*, 530 U.S. 1207 (2000); *see also, United States v. Ortega*, 94 F.3d 764, 770 (2nd Cir. 1996) (while finding it unnecessary to resolve issue definitively, court found "it significant that (so far as we [are] aware) every court of appeals that has considered the issue has concluded that a defendant convicted of a misdemeanor offense following a proceeding at which he was denied counsel may not later be sentenced to imprisonment for that offense, even though the sentence of imprisonment would be imposed for the defendant's violation of the terms of his probation").

B. Contrary to Professor Fried's Assertion, Contempt Is an Effective and Logical Tool for the Enforcement of Probation Orders.

The ability to impose a suspended sentence is important even if that sentence cannot be later activated. Indeed, in Alabama, to utilize probation — a tool recognized by this Court as important to the criminal justice system, *see Morrissey v. Brewer*, 408 U.S. 471, 477-79 (1972) — a trial court must first impose and then suspend a sentence of imprisonment. *See* ALA. CODE § 15-22-50 (1995) (stating that "[c]ircuit courts and district courts . . . may suspend execution of sentence and place on probation any person convicted of a crime in any court exercising

criminal jurisdiction"). A trial judge who does not conclude that a particular conviction warrants "actual imprisonment," but desires to retain jurisdiction over the defendant, must, therefore, impose a sentence of imprisonment, suspend that sentence, and place the defendant on probation. Reasoning consistent with that of Professor Fried — that a suspended sentence not subject to activation is no sentence at all — would deprive trial courts in Alabama of the ability to impose probation on uncounseled misdemeanor defendants.

Although a trial court may be precluded from enforcing the probation restrictions by activating a suspended sentence, it may enforce its probation orders through its contempt powers. "[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders. . . . " *Young v. United States*, 481 U.S. 787, 793 (1987). Indeed, this Court has recognized "[t]he ability to punish disobedience to judicial orders . . . as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796.

An Alabama trial court, like other state and federal courts, may utilize the power of contempt to "compel obedience to its judgments, orders and process. . . . " ALA. CODE § 12-1-7(3) (1995); (*see also*, Alabama Reply Brief at 11-12). The power of contempt provides an effective method of enforcing a criminal fine or restitution order which, according to the standard established in *Scott*, does not trigger the right to appointed counsel. *See Little v. State*, 693 So. 2d 30, 31 (Ala. Crim. App. 1997) (trial court possesses "authority to conduct . . . contempt proceedings . . . in its attempt to collect [an] unpaid fine"

imposed for defendant's misdemeanor crime). It is unclear how one could conclude that contempt is an acceptable method of ensuring the payment of a fine, such as that imposed in *Scott*, while, at the same time, deeming it inappropriate as an enforcement mechanism for probationary violations.

Professor Fried belittles the use of contempt powers with his assertion that "[w]e see no substantial difference between [pursuing a finding of contempt in] response to the defendant's breach and the remand to prison under the original sentence." (Fried Brief at 17) A contempt proceeding, however, focuses only on a defendant's post-conviction wrongdoing. Any sanction imposed following a finding of contempt is directly based on the post-conviction behavior. In contrast, because the post-conviction wrongdoing was then unforeseeable, the suspended or probated sentence was entered without any relation to that wrongdoing. Actually imprisoning a defendant for the underlying offense, no matter how long the initial incarceration date is delayed, violates the plain language of *Argersinger* and *Scott*. *See Argersinger*, 407 U.S. at 37 (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Scott*, 440 U.S. at 373 ("[A]ctual imprisonment [is] the line defining the constitutional right to appointment of counsel."). Moreover, activation of Shelton's suspended sentence would result in his "actual imprisonment" for thirty days. Clerk's Record 16. This fact alone refutes Professor Fried's contention that there is "no substantial difference between [contempt proceedings] and the remand to prison under

the original sentence." (Fried Brief at 17) The difference here is potentially an additional twenty-five days of incarceration. *See* ALA. CODE § 12-11-30(5) (1995) ("The circuit court may punish contempts by fines not exceeding one hundred dollars ($100) and by imprisonment not exceeding five days.").

Professor Fried's position would allow the activation of a suspended sentence for even a trivial violation of the probationary requirements. Under Fried's analysis, a defendant, whose sentence was originally suspended, could have that sentence activated for its duration one day following its entry for committing a minor traffic violation if, as here, the probation order prohibited the defendant from committing *any* further offense for a specified period. The severity of the sanction addressed in *Argersinger* and *Scott* was not based on the time of its enforcement, but on the nature of the penalty itself — "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment[.]" *Scott*, 440 U.S. at 373.

If subjected to contempt proceedings, Shelton would receive the full panoply of due process as required by this Court in *Cooke v. United States*, 267 U.S. 517, 537 (1925) (during prosecution of contempt, accused must be "advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation . . . includ[ing] the assistance of counsel, if requested, and the right to call witnesses to give testimony"); (*see also*, Alabama Reply Brief at 12). A court's contempt power is a flexible tool, providing a number of options to a judge when considering the most appropriate sanction for a defendant's breach. If Shelton refused to comply with "a

court's lawful . . . order, rule, or command[ ] [and] the dominant purpose of the contempt proceeding [was] to punish" him, the court could cite Shelton for criminal contempt. ALA. R. CRIM. P. 33.1(b)(3)(b). Whereas, if the "court's . . . order, rule, or command[ ] . . . by its nature [was] still capable of being complied with[,]" the court could cite Shelton for civil contempt. ALA. R. CRIM. P. 33.1(b)(4). Regardless of the violation, Shelton would be subject to similar punishments. Contrary to Professor Fried's intimation (Fried Brief at 17-18), there is nothing unusual about a trial court's use of contempt as a method of enforcing its orders.

III. THE CONSTITUTIONALITY OF SHELTON'S SENTENCE DOES NOT DEPEND ON THE RESOLUTION OF THE ISSUE ADDRESSED IN PROFESSOR FRIED'S BRIEF.

Professor Fried's brief confirms that Shelton's suspended sentence is clearly constitutional under *Argersinger* and *Scott*. Under Professor Fried's reading of *Argersinger* and *Scott*, the activation of Shelton's suspended sentence would not run afoul of the Constitution. *See* Fried Brief at 16 ("[T]he uncounseled conditional sentence is valid when imposed because it does not result in actual incarceration in that proceeding."). On the other hand, the State of Alabama reads *Argersinger* and *Scott* to preclude such a result. Under either interpretation, however — one allowing for revocation of probation and one prohibiting such a result — Alabama and Professor Fried agree that Shelton's suspended sentence is clearly constitutional.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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